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IN THE

Supreme Court of the United States

WISCONSIN RIGHT TO LIFE,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF A COALITION OF PUBLIC CHARITIES, AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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INTEREST OF THE *AMICI CURIAE*

Amici[1] are thirty-five public charities, tax-exempt under section 501(c)(3) of the Internal Revenue Code. Individual organizations' Statements of Interest are presented below.

A. OMB Watch

OMB Watch is the operating name of Focus Project, Inc., a nonprofit corporation organized under section 501(c)(3) of the Internal Revenue Code. Its goal is to promote government accountability and citizen participation in public issues. It is guided by the belief that improving access to governmental decision-makers and energizing citizen participation will lead to a more just, equitable and accountable government, and a stronger society.

OMB Watch's primary focus areas are the federal budget; nonprofit advocacy; government transparency and accountability; and legislation and regulations impacting economic justice, health, safety, and the environment. OMB Watch has a 17-person staff and a $1.7 million annual budget. On this modest budget it has had a significant impact. Over the years, it has played a leadership role on important federal policies, including regulatory reform measures, balanced budget constitutional amendments, and the repeal of the estate tax. Roughly ninety percent of its revenue comes from foundations, often in the form of project grants.

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[1] This brief is filed with the consent of all parties, as indicated by letters of consent filed with the Court. No counsel for a party authored this brief, in whole or in part. No person or entity other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

In order to be effective, OMB Watch must react quickly and flexibly to emerging policy debates. Changing congressional goals require it to shift from planned agenda items to unplanned ones. It often works through coalitions, and it places a high value on bridging the gap between Washington and the grassroots level, and energizing citizens at the community level. The coalitions OMB Watch leads connect it to scores of umbrella groups and national membership associations. They, in turn, distribute OMB Watch's materials to thousands of their respective constituents around the country.

When choosing how it will communicate, OMB Watch along with its coalition partners must select means of communication that are suitable to the task. For example, if the House of Representatives or the Senate unexpectedly schedules a vote of importance, time does not always allow for a direct mail or telephone campaign. Broadcast advertising may be the only way to influence the debate.

OMB Watch and its coalition partners of nonprofit organizations take advantage of free and paid media efforts to spread their messages. If they cannot afford to pay for television or radio advertisements, they rely on the broadcasters' willingness to provide unpaid access. Access is provided consistent with the broadcasters' legal obligation to operate in the public interest. OMB Watch and its coalition partners also hold press conferences or other informational events, some of which are covered by C-SPAN or local public interest channels.

As a public charity, OMB Watch does not and cannot use these occasions to intervene in political campaigns. Nevertheless, in the course of a typical broadcast there will be regular references to clearly identified officeholders who may also be candidates for federal office. Indeed, it is

impossible for OMB Watch to avoid referring to federal candidates, given that the key decision-makers on the issues it seeks to affect are almost always qualified as candidates under federal campaign finance law. Almost invariably, the sponsor of the legislation discussed or the executive who has initiated the policy debate is also a federal candidate.

Because OMB Watch is a public charity, it does not have the option of speaking through an affiliated political committee. As a result, due to the electioneering communication restrictions, it has only two choices: stay silent or risk prosecution.

B. Independent Sector

Independent Sector ("IS"), a nonprofit corporation organized under section 501(c)(3) of the Internal Revenue Code, is the leadership forum for charities, foundations, and corporate giving programs committed to advancing the common good in America and around the world. Its nonpartisan coalition leads, strengthens, and mobilizes the charitable community in order to fulfill its vision of a just and inclusive society of active citizens, vibrant communities, effective institutions, and healthy democracy. Independent Sector's membership of 500 organizations collectively represents tens of thousands of charitable groups serving every cause in every region of the country, as well as millions of donors and volunteers.

IS serves as the premier meeting ground for the leaders of America's charitable and philanthropic sector. Since its founding in 1980, IS has sponsored ground-breaking research; fought for public policies that support a dynamic, independent sector; and created resources so staff, boards, and volunteers can improve their organizations and better serve their communities. IS fulfills its mission by convening

sector leaders to work together on key issues; promoting policies that enable the charitable community to engage with public officials on a nonpartisan basis; supporting the development and dissemination of strategies to strengthen volunteering, voting, giving, and other forms of citizen engagement; encouraging the sector to meet the highest standards of ethical practice and effectiveness; and serving as the voice of the charitable community to the media, government, business, and international voluntary communities.

IS is currently engaged in a broad range of public policy issues ranging from federal and state regulation of charitable organizations, federal tax and spending policies, federal tax incentives for charitable giving, and protecting the advocacy rights of nonprofit organizations. The majority of its members are 501(c)(3) organizations that may not participate in, or intervene in any political campaign on behalf of (or in opposition to) any candidate for public office, but these organizations frequently engage in advocacy efforts to inform public policy debates on issues that affect their constituents' and their ability to fulfill their charitable purposes.

These advocacy efforts at times include communications with elected officials in their current capacity as representatives of the people, whether or not they are, at the same time, candidates for federal office. Organizations cannot predict or control the timing of when an issue will be considered by public officials. Some of IS's member organizations, for example, are concerned about the possibility of estate tax repeal because of the negative effect that would have on charitable giving. Their ability to encourage the public to contact their elected officials about a pending vote on the estate tax would be curtailed if the vote was scheduled during an election period. IS members may find it necessary to run ads asking a local official to keep a

particular shelter open, even though the official is also a candidate for federal office. IS members have called on the public to contact their congressional representatives about pending votes that affect the funding and eligibility requirements for specific government programs related to charitable purposes ranging from human services to health to the arts.

C. Independence Institute

The Independence Institute is a 501(c)(3) educational organization, founded in 1985. Located in Colorado, it is a state-based think tank. The Independence Institute is established upon the eternal truths of the Declaration of Independence. The Institute is a non-partisan, non-profit public policy research organization dedicated to providing timely information to concerned citizens, government officials, and public opinion leaders. The Independence Institute is involved in local, state, national, and international issues.

Much of the Institute's work is carried out through several Centers which are part of the Institute: the Education Policy Center, the Health Care Policy Center, the Second Amendment Project, the Center for the American Dream, the Campus Accountability Project, and the Fiscal Policy Center. The work of all these Centers often intersects with policy questions being debated by Congress.

The Independence Institute communicates with the public in a very broad variety of ways: through newspaper articles, television and radio programs, books, law review articles, presentations at scholarly conferences, legislative testimony, e-mail, podcasts, long monographs, and shorter research papers. For many years, the Independence Institute has also communicated with the public through radio advertising, one

of the communications media which is censored by the speech restrictions enacted by Congress in 2002.

Radio advertising is a very important part of the Independence Institute's educational mission. The Institute's other means of communications (such as research papers and newspaper op-eds) are certainly important, but they reach only a small fraction of the public – a relatively elite fraction that already has a high pre-existing interest in policy questions. In contrast, radio advertising allows the Institute to communicate with a much broader group of the public. Such advertising allows the Institute to share its ideas with hundreds of thousands or millions of people whom, as a practical matter, the Institute has no other capacity to reach. Significantly, radio advertising allows the Institute to present its ideas in their purest form – without the limitations (and, sometimes, distortions) of those ideas being rephrased or selectively quoted by a reporter.

The speech restrictions imposed in 2002 chill the Independence Institute's ability to communicate with the public about important federal questions during the thirty and sixty days censorship periods. The Independence Institute has no desire to advocate for the election of federal candidates (or, for that matter, state and local candidates). In twenty years, the Independence Institute has never done so. The Independence Institute has a perfect record of compliance with all federal, state, and local laws against candidate advocacy by non-profit organizations. Indeed, because the Independence Institute is founded to advance particular ideas – namely the eternal truths of the Declaration of Independence, as applied to contemporary concerns – we will often praise a particular Congressperson one week (such as for voting against pork-barrel spending), and criticize the

same Congressperson the next week (such as for supporting restrictions on a Bill of Rights freedom).[2]

SUMMARY OF ARGUMENT

The "electioneering communication" restrictions of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 166 Stat. 81, 91 (codified at 2 U.S.C. § 441b(c)), cannot constitutionally be applied to 501(c)(3) charities like *amici*. Sections 203 and 204 of BCRA were designed to prevent "sham issue ads." Yet *amici* are, by definition, nonpartisan and nonpolitical organizations. They cannot intervene in a political campaign without violating the law.

Moreover, unlike the corporations whose sham ads Congress sought to curb, charities like *amici* do not enjoy the alternative of establishing federally-registered political committees ("PACs") to engage in political spending. The availability of a PAC spending option was a critical consideration for this Court in upholding the electioneering communication restrictions in *McConnell v. FEC*, 540 U.S. 93, 206 (2003), just as it was when the Court upheld the statute under challenge in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 670 (1990). Yet this option does not exist for charities like *amici*. The district court suggests that the severity of the injury to Appellant's free speech interest is allayed because it can speak freely through its separate segregated political fund. Public charities find no comfort in this suggestion; their nonpartisan voices are targeted for silence.

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[2] Additional Interests of Amici are included in the Appendix to this brief.

Finally, section 501(c)(3) organizations, unlike for-profit corporations, are not in a position to use vast resources accumulated in the commercial marketplace to dominate the political debate. Quite to the contrary, section 501(c)(3) organizations often serve as a counterweight to the immense resources that corporations expend to influence government policy.

Neither of the justifications relied upon by the Court in *McConnell* to uphold the electioneering communication restrictions is present here. There is no record to support a claim that the activities of these organizations have led to corruption of government officials. Nor is there any evidence that the grassroots lobbying efforts of public charities distort the political process. Public charities have not been, and are not plausibly considered, vehicles for corporate circumvention of our election laws. The application of the electioneering communication restrictions to the legitimate grassroots lobbying of public charities is unsupportable.

Rather than corrupting or distorting our democracy, public charities enhance it. They bring voices to the deliberations of government that otherwise might not be heard. If their communications pose a threat to the integrity of our government, it has not been demonstrated. Indeed, the very transparency and accountability of governmental processes depend on untrammeled speech on public policy by organizations like *amici*.

The First Amendment guarantees their right to speak, subject to the rules that already exist to prohibit and penalize political intervention by them. In considering whether Appellant is entitled to a grassroots lobbying exception, this Court should ensure that any legal restrictions on such lobbying cannot be applied in a manner that would deny

public charities their First Amendment right to petition their government.

ARGUMENT

A. Nonprofit Lobbying Is Protected by the First Amendment

"Congress shall make no law respecting . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. CONST. amend. I. This right is "implicit in '[t]he very idea of government, republican in form.'" *McDonald v. Smith*, 472 U.S. 479, 482 (1985) (quoting *United States v. Cruikshank*, 92 U.S. 542, 552 (1876)). "For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it." 1 BLACKSTONE'S COMMENTARIES editor's app. at 297 (St. George Tucker ed., Philadelphia, Birch & Small 1803), *quoted in New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964) (Goldberg, J., concurring in result).

Nowhere is the right to petition more deeply implicated then when a representative body insulates itself from the opinions of those it represents. Measures that have the effect of silencing the public voice precisely at the time legislation is being considered are, as Blackstone suggests, a threat to the very concept of popular sovereignty. If the right to petition is to have meaning, it needs to find expression on those occasions.

This Court has consistently held that the right to petition applies equally to all branches of government. *See Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510

(1972). This Court has recognized that "the First Amendment protects the right of corporations to petition legislative and administrative bodies." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 791 (1978). The First Amendment protection of lobbying is even more powerful when the goals sought are political rather than economic. *See Or. Natural Res. Council v. Mohla*, 944 F.2d 531, 535 n.3 (9th Cir. 1991).

Grassroots lobbying efforts conducted by nonprofit corporations fall squarely into the protection offered by the right to petition. The lobbying campaigns restricted by 2 U.S.C. § 441b(c) are speech campaigns directed at legislative and executive officials and designed to influence the shape and direction of public policy as specific governmental measures or actions are considered. The lobbying causes championed by section 501(c)(3) organizations are used to bring light to otherwise little-known issues, and to mobilize the public on issues of national public importance. Lobbying is at the heart of the activity protected by the First Amendment.[3] The right to petition is in essence a right to be heard and it is that right that *amici* seeks to preserve.

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[3] "[The right of petition] would seem unnecessary to be expressly provided for in a republican government, since . . . [i]t is impossible that it could be practically denied until the spirit of liberty had wholly disappeared, and the people had become so servile and debased as to be unfit to exercise any of the privileges of freemen." 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 645 (5th ed. 1891).

B. The Electioneering Communication Restrictions Uniquely Burden Section 501(c)(3) Organizations

1. The Electioneering Communication Restrictions Are Broad

The electioneering communication restrictions cut a broad swath through otherwise permissible lobbying by section 501(c)(3) organizations. In practice, they criminalize all broadcast references to a "clearly identified candidate," even if the context is not electoral. *See* 2 U.S.C. § 434(f)(3)(i). The Federal Election Commission ("FEC") regulations make clear that "clearly identified" includes such innocuous references as "your Congressman." 11 C.F.R. § 100.29(b)(2). Indeed, even a reference to the popular name of legislation that includes a candidate's name, such as "McCain-Feingold," would count as a clear reference. *See* Electioneering Communications, 67 Fed. Reg. 65,190, 65,202 (Oct. 23, 2002).

The FEC limited the reach of the ban to broadcast communications for a fee. *See* 11 C.F.R. § 100.29(b)(3)(i). This limitation was challenged, and the United States District Court for the District of Columbia found the exemption to be inconsistent with the plain meaning of the statute. *See Shays v. FEC*, 337 F. Supp. 2d 28, 129 (D.D.C. 2004). The FEC appealed, and the United States Court of Appeals for the District of Columbia Circuit affirmed the district court's decision. *Shays v. FEC*, 414 F.3d 76, 109 (D.C. Cir. 2005). As a consequence, any reference made to a candidate in a public service announcement or over a public access channel is now subject to the electioneering communication restrictions. The only remaining exemption is for references made by a qualified press entity during the course of a news story, commentary or editorial. Nine states have gone even

further than the congressional prohibition and created electioneering communication laws that reach forms of communications other than the broadcast medium.[4]

Because section 501(c)(3) organizations pose no constitutionally cognizable threat to the governmental interests targeted by the electioneering communication restrictions, the FEC originally granted them a blanket exemption from the rules. *See* 11 C.F.R. § 100.29(c)(6). However, last year the United States District Court for the District of Columbia found that this exception violated the Administrative Procedures Act.[5] *See Shays*, 337 F. Supp. 2d at 127. The FEC did not appeal this portion of the district court's decision and is proposing rules that would cover communications by section 501(c)(3) organizations.

The holding of the district court in this case, coupled with the developments in the *Shays* litigation, suggests that the FEC has very little authority to protect 501(c)(3) activities.

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[4] *See* ALASKA STAT. § 15.13.400(5); COLO. CONST. ART. XXVIII, § 2(7); FL. STAT. § 106.011(18); HI. CODE R. § 11-207.6; IDAHO CODE ANN. § 67-6602(f); 10 ILL. COMP. STAT. 5/9-1.14; OKLA. STAT. tit. 74, § 257:1-1-2; WASH. REV. CODE § 42.17.020(20); W. VA. CODE § 3-8-1A(10); *see also* GUAM CODE ANN. tit. 3, § 19112.1.

[5] The District Court's decision puts the FEC in a difficult position. Because the FEC may not provide a blanket exemption for section 501(c)(3) organizations and may only exempt communications that do not promote, attack, support or oppose a candidate, the FEC will need, for example, to examine the content found on cable channels devoted to religious broadcasting. A reference to a candidate in a religious program or a candidate's appearance during a broadcasted service in the electioneering blackout period would be covered by the ban.

The district court in this case said that Appellant's proposed advertising "may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." (Mem. Op. 6.) Implicit in the district court's decision is the conclusion that Appellant's proposed ad attacked Senator Feingold and therefore could not be exempted. If Appellant's ads, seemingly neutral in content, crossed the line, then it is hard to imagine a 501(c)(3) lobbying ad that the FEC could *ever* exempt. Unless the Court weighs in, the FEC will be compelled to give the broadest reading to the statute. No incorporated section 501(c)(3) organization could ever confidently make an electioneering communication.[6]

The FEC's hands appear to have been judicially tied. The agency is no longer able to give meaningful relief to section 501(c)(3) organizations. Under the decision of the court below, it is poised to interpret the ban broadly to cover all direct advertising and public service announcements offered by section 501(c)(3) organizations, however neutral in content. And if the district court's characterization of Appellant's ads is correct, the FEC will likely need to examine the motives of the speaker before allowing an ad. Thus, the FEC, even if it were disposed to do so, could not grant the relief that Appellant seeks and *amici* support.

The district court held that the last remaining source of relief – a constitutional as-applied challenge to the electioneering communication restrictions – is no longer

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[6] In fact, in rules recently proposed by the agency, the FEC is considering, among other approaches, a requirement that any 501(c) grassroots lobbying avoid language that could be construed to "promote, attack, support or oppose" a federal candidate. Under the law, as under the proposed rules, there is no definition offered for this term.

available. (Mem. Op. 4.) In so holding, it relied on *McConnell*, which upheld "all applications of the primary definition [of electioneering communications]." 540 U.S. at 190 n.73. This holding misstates *McConnell*, and leaves both Appellant and *amici* in an unconstitutional bind. This Court also held that "we assume that the interests that justify the regulation of campaign speech might not apply to the regulation of genuine issue ads." *Id.* at 206 n.88. If the district court's decision is affirmed, this Court would be foreclosing the ability to vindicate a right that this Court suggests *amici* may well enjoy. To deny parties access to the courts under those circumstances, when the very right at stake is the right to petition the government, is an irony the Constitution cannot indulge.

2. Section 501(c)(3) Organizations Cannot Comply with the Restrictions by Speaking Through Separate Segregated Funds

One of the rationales that this Court used to uphold 2 U.S.C. § 441b(c) is that corporations and unions could pay for otherwise covered advertisements through their PACs. *See id.* at 206. Yet section 501(c)(3) organizations are prohibited from establishing such PACs, because of their inability to participate in partisan activity. *See* I.R.C. § 501(c)(3); *see also* J.E. Kindell & J.F. Reilly, *Election Year Issues*, EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM 335, 344 (2002).

The effect is to single out section 501(c)(3) organizations for silence. The irony could not be greater. Organizations prohibited from partisan political intervention as a condition of their tax status, and that have presented no evidence of sponsoring "sham issue ads" are left with no access to the airwaves during the thirty and sixty day "blackout periods."

Meanwhile, the very corporations and unions that Congress saw as evading the campaign finance laws remain able to sponsor broadcast advertisements through their PACs. This is constitutionally untenable.

C. The Justifications that Led Congress to Pass the Electioneering Communication Restrictions, and This Court to Uphold Them, Do Not Apply to Section 501(c)(3) Organizations

1. Section 501(c)(3) organizations cannot intervene in elections

Section 501(c)(3) organizations like *amici* must apply to the Internal Revenue Service ("IRS") for approval of their status. *See* I.R.C. § 508(a). In order to gain approval as a section 501(c)(3) entity, and to have contributions be deemed tax-deductible by the contributors, *see id.* § 170(a)(1), the organization must prove to the IRS that it can meet the organizational and operational limitations under section 501(c)(3). *See generally* Treas. Reg. § 1.501(c)(3)-1.

Though section 501(c)(3) organizations face a host of statutory and regulatory restrictions on their behavior, two are important for purposes of applying the electioneering communication restrictions.

First, section 501(c)(3) charities must "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." I.R.C. § 501(c)(3); *see also id.* § 170(c)(2)(D). This ban is absolute; there is no *de minimis* or insubstantial amount of political intervention that is permissible. Organizations that engage in any political intervention at all risk their status under section 501(c)(3). Moreover, in 1987, Congress amended the Internal Revenue Code to provide for fines against the

individuals in a section 501(c)(3) organization who approve expenditures for political purposes. *See id.* § 4955.

The IRS defines "political intervention" broadly. The term is not limited to merely expressly advocating the election or defeat of candidates, nor even to the promotion, support, attack or opposition of candidates; instead, the IRS examines the facts and circumstances of the activity at issue. *See, e.g.*, *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000); *Christian Echoes Ministries, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), *cert. denied* 414 U.S. 864 (1973). The context of the activity is weighed alongside the activity itself; communications that would alone be considered lobbying can become impermissible political intervention if conducted in a context of partisanship. *See* E. Kingsley & J. Pomeranz, *A Crash at the Crossroads: Tax and Campaign Finance Laws Collide in Regulation of Political Activities of Tax-Exempt Organizations*, 31 WM. MITCHELL L. REV 55, 69 (2004).

Second, while section 501(c)(3) organizations can and do engage in grassroots lobbying, they are limited in the extent to which they may do so. "No substantial part" of the activities of section 501(c)(3) organizations may be attempts to influence legislation. I.R.C. § 501(c)(3). The amount of permitted lobbying varies, depending on whether the organization has elected to proceed under the expenditure test, or whether it is subject to the default "substantial part" test. *See id.* § 501(h); *id.* § 4911(c); Treas. Reg. § 1.501(h)-1(a). Either way, a section 501(c)(3) organization cannot devote a large portion of its activities to lobbying, including both the direct lobbying of officeholders and indirect

"grassroots" lobbying.[7] For organizations electing the expenditure test, the IRS imposes fines for lobbying in excess of the prescribed limits. *See id.* § 4911. Violation of the terms of either the substantial part test or the expenditure test can lead to the revocation of an organization's tax-exempt status.

Thus, section 501(c)(3) organizations cannot legally function as vehicles to distort the political process, or to serve as agents of officeholder corruption, even in the absence of the electioneering communication restrictions. Public charities are severely limited in even the amount of lobbying they can conduct; and they are strictly forbidden to engage in any political intervention.

2. The legitimate lobbying efforts of section 501(c)(3) organizations pose no risk of corruption or evasion

There are two potential justifications for the government regulation of political speech: "corruption or the appearance of corruption," *McConnell*, 540 U.S. at 179; and "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form," *see Austin*, 494 U.S. at 660, *quoted in McConnell*, 540 U.S. at 205. Neither of these justifications applies to bona fide lobbying by section 501(c)(3) organizations.

In *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court found that independent political expenditures do "not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign

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[7] Private foundations are even more restricted; they cannot engage in any lobbying activities at all. *See* I.R.C. § 4945(d)(1).

contributions." *Id.* at 46. Lobbying efforts pose even less of a danger. Because of the Internal Revenue Code's restrictions on political intervention, and because of the Federal Election Campaign Act's restrictions on coordination, *see* 2 U.S.C. § 441a(a)(7), a section 501(c)(3) organization cannot distribute lobbying communications in conjunction with candidates or political parties. No candidate or political party may request or suggest the communication; may be materially involved in the communication; may have a substantial discussion with the sponsor regarding the communication; or may use a common vendor or former employee to coordinate the communication. *See* 11 C.F.R. § 109.21. The *Buckley* rationale is simply not implicated in legitimate grassroots lobbying by public charities; such groups lack the motive and opportunity to corrupt. If unlimited independent spending by a political committee does not pose sufficient risk of corruption to justify regulation, then certainly the limited grassroots lobbying of a public charity must provide less.

Nor is the *Austin* rationale implicated. Unlike for-profit corporations, section 501(c)(3) organizations cannot accumulate commercial wealth to dominate the political debate. Their resources must be devoted to public purposes. The idea that commercial corporations are likely to use public charities to circumvent the electioneering communication restrictions is the product of imagination, not experience.

There is no evidence that genuine lobbying will serve as a vehicle for the use of corporate funds to promote corporate "political ideals." *McConnell*, 540 U.S. at 205. Unlike "sham issue ads," which this Court found to be the "functional equivalent" of express advocacy, legitimate lobbying efforts are not "intended to influence the voters' decisions." *See id.* at 206. There is no evidence that section

501(c)(3) organizations produce the "bogus issue advertising" that was the focus of the electioneering communication restrictions. *See id.* at 129. Indeed, the evidence Congress compiled regarding "sham issue ads," on which this Court relied heavily in upholding the electioneering communication restrictions, gave no hint that genuine charitable grassroots lobbying was a threat. *See id.* at 126-32. Congress was concerned about the sorts of advertisements that section 501(c)(3) organizations cannot legally sponsor – those that mimicked the form and content of lobbying advertisements, but were actually crafted to intervene in elections by turning voters against candidates. *See id.* at 129.

There was and remains good reason to believe that other laws effectively deter section 501(c)(3) organizations from engaging in sham issue advertising. The legislative record is devoid of facts that would suggest a different conclusion. Congress simply produced no evidence that grassroots lobbying by public charities was a source of legislative concern. Similarly, the FEC found no evidence during its rulemaking that suggests sham issue ads sponsored by 501(c)(3) organizations are a problem. *See* 67 Fed. Reg. at 65,200.

3. Legitimate lobbying efforts are an important part of a charitable mission

Seventy-eight percent of section 501(c)(3) organizations participate in policy debates through grassroots lobbying, according to a survey of over 1,700 section 501(c)(3) organizations conducted by OMB Watch in 2002. While some lobbying efforts are ongoing efforts, more often they are deployed quickly to respond to unanticipated legislative developments. These campaigns depend on speed and

timeliness. To require them to stop during the sixty days before a general election would render them ineffective.

The blackout periods for electioneering communications create an additional problem. Legislators and lobbyists can easily take advantage of the blackout to enact legislation hostile to nonprofit organizations' interests, knowing that the nonprofit community will have difficulty mobilizing public opposition. Underscoring this concern is the longstanding practice of Congress of appending controversial riders to appropriations bills that are considered in the sixty day period before the general election.

D. The Electioneering Communication Restrictions Cannot Constitutionally Be Applied to Legitimate 501(c)(3) Lobbying

The electioneering communication restrictions cannot constitutionally be applied to the legitimate grassroots lobbying in which public charities may engage. In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), this Court held that the corporate expenditure prohibition of 2 U.S.C. § 441b cannot be applied to certain nonprofit corporations. It relied on the organizational structure of the nonprofit corporation in that case, and found that its structure "prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *Id.* at 264.

Just as the characteristics of an MCFL corporation keep section 441b from being constitutionally applied to its activities, the characteristics of a section 501(c)(3) organization keep the electioneering communication restrictions from being constitutionally applied to its legitimate grassroots lobbying. The strict prohibition on political intervention and the harsh limits on the amount of

lobbying – backed both by fines, and by the ultimate penalty of tax-exempt revocation – make it impossible for section 501(c)(3) organizations to serve as conduits for impermissible political expenditures. Moreover, an entity cannot simply assert section 501(c)(3) status; the government must affirmatively grant it after an arduous application process, and can revoke it at any time.

It is essential for this Court to acknowledge this limit on the scope of the electioneering communication restrictions. The FEC's attempt to completely exempt section 501(c)(3)s from the electioneering communication restrictions has now been overturned on statutory grounds. *See Shays*, 337 F. Supp. 2d at 127. If the law continues to be understood to apply to 501(c)(3) lobbying, then charities will be singled out for silence, while for-profit corporations, unions and even so-called "527s" will enjoy opportunities to speak over the airwaves during the thirty and sixty day windows.

E. Public Charities Must Have Flexibility to Conduct Their Grassroots Lobbying Activities

Even in the absence of an absolute exception for all grassroots lobbying by section 501(c)(3) organizations, the Constitution compels ample space for these kinds of communications. The First Amendment also forbids any requirement that public charities use segregated individual funds to speak during the electioneering communications periods.

1. The Constitution commands more space for charitable grassroots activity than the law on its face would allow or than the government concedes

There are times in which legitimate lobbying campaigns detail the current, tentative stance of a legislator, or his or her

past record on an issue. Such details are sometimes necessary to explain the immediacy of an issue to the public.[8] Stripped of this detail, effective advocacy is reduced to a whimper. Section 501(c)(3) organizations, given their unique status, must have the flexibility, not afforded by the law on its face or as read by the government, to use these techniques. The Constitution requires that the law be read to permit section 501(c)(3) organizations to conduct activities permitted under the right to petition, while it seeks to restrict the "sham issue ads" targeted by Congress and this Court in *McConnell*. *See* 540 U.S. at 129-32.[9]

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[8] Indeed, only thirty-five percent of Americans can name their member of Congress at all. GARY W. SELNOW, ELECTRONIC WHISTLE-STOPS: THE IMPACT OF THE INTERNET ON AMERICAN POLITICS (1998). Without the ability to name names and describe legislators' positions on issues, it is difficult, if not impossible, to generate grassroots activity.

[9] One example of a flexible approach to lobbying activity is found in the *Noerr-Pennington* doctrine. Through this doctrine, this Court has established parameters to determine whether or not a lobbying effort is a sham. The question is whether the activities are "not genuinely aimed at procuring favorable government action" at all. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 n.4 (1988). Lobbying activities are protected if they are aimed at achieving "governmental action," but not if their goals are achieved only by "the lobbying process itself." *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 379 (1991). Similar protections are extended to the filing of litigation, where this Court has considered it important whether litigants "could realistically expect success on the merits." *Prof'l Real Estate Developers, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60 (1993). Because the *Noerr-Pennington* test implicates the right to petition, and because *amici* are only requesting the ability to conduct legitimate lobbying efforts, this test could serve as a guide

2. Section 501(c)(3) Organizations Should Be Permitted to Use General Funds

Appellant has suggested that when carving out a constitutional exception to the electioneering communications restrictions, this Court could require that the communications be paid for with wholly individual funds. In so doing, the as-applied exception would be similar to that of *MCFL*, 479 U.S. at 264, which applied only to social welfare organizations that foreswore all corporate and labor union contributions.

While this may be a necessary step to prevent corporate political expenditures by most nonprofit corporations, it is wholly unnecessary to require the same from section 501(c)(3) organizations, which are structurally unable to serve as vehicles for corporate political activity. Because section 501(c)(3) organizations are expressly forbidden to engage in political activity, they cannot be used as conduits for corporate political speech. Furthermore, because their mission is by definition to support public and beneficial causes as defined in the Internal Revenue Code and in IRS regulations, any speech they make cannot have the effect of magnifying corporate interests. In short, a requirement that only individual funds be used may make sense as applied to a nonprofit corporation that is permitted to engage in some political activity, such as Appellant, but the same standard need not apply to *amici* and to other public charities.

A requirement of this kind would impose a significant administrative burden on section 501(c)(3) organizations. Rather than assume this burden, many public charities will choose not to air their views on matters of public concern or

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when determining the extent of an as-applied exception to the electioneering communication restrictions.

will self-censor what they say. This will likely be the case for most small community-based public charities.[10]

CONCLUSION

Amici urge this Court to consider the as-applied challenge in this case and find in favor of Appellant, and we support Appellant's right to conduct certain restricted lobbying activities during the electioneering communication periods. Yet the Court should also consider the special circumstances presented by public charities like *amici.* Even though they are barred from partisan political intervention, and present no record or opportunity for corruption or evasion, they stand alone as groups that are completely limited in their ability to petition their elected officials over the airwaves before an election.

In finding for Appellant, the Court should make it clear that the electioneering communication restrictions cannot constitutionally be applied to the bona fide grassroots lobbying of public charities. Such an outcome is consistent with precedent, and is essential to ensure that important, nonpartisan voices fully enjoy their right to petition their government.

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[10] Although these organizations seldom can afford to pay for major broadcast advertising, the organizations will be impacted in their use of public service announcements and public access television and radio channels. These organizations are also very concerned with the trend apparent in state law to adopt similar bans on "electioneering communications" and to expand the definition to include other forms of communication. *See supra* note 4.

Respectfully submitted,

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APPENDIX

ADDITIONAL INTERESTS OF AMICI

National Organizations

Alliance for Justice

Alliance for Justice is a 501(c)(3) national association of environmental, civil rights, mental health, women's, children's, and consumer advocacy organizations. These organizations and their members support legislative and regulatory measures that promote political participation, judicial independence, and greater access to policy processes. Most of Alliance for Justice's members are charitable organizations that receive tax exemption under Section 501(c)(3) of the Internal Revenue Code. A significant number of its members also work with, or are affiliated with, other types of nonprofit organizations that promote their views not only through public education and advocacy on public policy issues but also in the electoral process. Alliance for Justice and its 501(c)(4), Alliance for Justice Action Campaign, occasionally run broadcast ads on legislative issues – particularly those relating to judicial nominations.

American Conservative Union Foundation

The American Conservative Union Foundation ("ACUF") is the educational and charitable arm of the American Conservative Union ("ACU"), the nation's oldest conservative lobbying organization. ACUF created the "Conservative University," designed to place all of the classic documents and books of the conservative movement in one, central location. The mission of the Conservative University is to train the next generation of conservative leaders nationally by providing them, in a systematic, easily available and focused manner, the intellectual tools necessary to become successful political and civic leaders. It is a

mission that must be advanced or the movement will die. There are many things taught to conservatives but the specific mission here is to provide a fundamental core curriculum and set of ideas that can provide a lifetime guide to political and social decision-making.

Center for Lobbying in the Public Interest

The Center for Lobbying in the Public Interest promotes, supports and protects nonprofit advocacy and lobbying in order to strengthen participation in our democratic society and advance charitable missions. It accomplishes this mission through strategic messaging, a national training program, targeted resources housed on its website, www.clpi.org, and co-convening of left/right coalitions to expand and defend nonprofit advocacy rights.

NARAL Pro-Choice America Foundation

NARAL Pro-Choice America Foundation's mission is to support and protect, as a fundamental right and value, a woman's freedom to make personal decisions regarding the full range of reproductive choices through education, training, organizing, legal action, and public policy.

National Council of Jewish Women, Inc.

The National Council of Jewish Women, Inc. (NCJW) is a volunteer organization, inspired by Jewish values, that works to improve the quality of life for women, children, and families and to ensure individual rights and freedoms for all through its network of 90,000 members, supporters, and volunteers nationwide.

National Legal and Policy Center

The National Legal and Policy Center (NLPC) promotes ethics in public life through research, education and legal

action. NLPC is a 501(c)(3) non-profit foundation which has played an active role in the public policy debate regarding issues affecting governmental and public accountability. In furtherance of its mission, NLPC has been asked to testify on numerous occasions before Congressional committees and has participated in public policy debates. NLPC strongly opposes restrictions which will have the effect of chilling First Amendment rights of non-profits to vigorously engage in public discussion on a wide array of issues which are being considered before Congress at any given time.

National Council of Nonprofit Associations

The National Council of Nonprofit Associations (NCNA) is the network of state and regional nonprofit associations serving over 22,000 members in 46 states and the District of Columbia. NCNA links local organizations to a national audience through state associations and helps small and mid-sized nonprofits manage and lead more effectively; collaborate and exchange solutions; save money through group buying opportunities; engage in critical policy issues affecting the sector; and achieve greater impact in their communities.

National Low Income Housing Coalition

The National Low Income Housing Coalition is dedicated solely to ending America's affordable housing crisis. It believes that this is achievable, that the affordable housing crisis is a problem that Americans are capable of solving. While it is concerned about the housing circumstances of all low income people, it focuses its advocacy on those with the most serious housing problems, the lowest income households.

Violence Policy Center

The Violence Policy Center (VPC) is a national educational organization that engages in research and policy development to prevent firearm-related death and injury in America. The VPC regularly communicates with grassroots organizations and individuals in an effort to educate the public, policymakers and the media, and to activate support for gun violence prevention strategies.

Arizona Organizations

Association of American Physicians & Surgeons Educational Foundation

The Association of American Physicians & Surgeons (AAPS) Educational Foundation is an Arizona corporation founded in 1996. A 501(c)(3) organization, AAPS Educational Foundation advocates on behalf of free enterprise in medicine. It educates the public on the practice of private and ethical medicine. As part of its activities, it informs the public about positions taken by public officials. The dissemination of this information can occur within thirty days of an election by a public official. While AAPS Education Foundation does not attempt to influence the outcome of elections, its advocacy can occur in proximity to an election and thus be chilled by the contested campaign finance regulations.

California Organizations

Eden Housing, Inc.

Eden Housing is a nonprofit affordable low-income housing developer, manager and resident services provider. It works within communities to advocate for affordable housing and for the establishment and retention of social

services to help its low-income resident families, seniors and people with disabilities.

California Association of Nonprofits

California Association of Nonprofits is the nation's largest nonprofit state association. It is dedicated to reducing the barriers in the external environment in which nonprofits work and to streamlining internal operations and developing tools nonprofits can use to save time and money. With over 2,000 members representing all nonprofit sub-sectors, CAN's mission is to (a) expand and strengthen the influence, accountability, and effectiveness of California nonprofits in a manner that builds their capacity to accomplish their missions, and (b) preserve and promote the idealism and value of nonprofits in California.

Connecticut Organizations

Connecticut Association of Nonprofits

The Connecticut Association of Nonprofits organization represents nearly 500 nonprofit organizations in Connecticut. It is exempt under 501(c)(3), as are its full members.

Kentucky Organizations

- Clients Council of the Legal Aid Society

Multi-County Clients Council is a 25 year old organization that has been serving the low-income community since 1981. M3c addresses the needs and issues of the low wealth client community by providing information, educational and referral services as it relates to government benefits and services its clients receive.

Florida Organizations

Florida Association of Nonprofit Organizations

Incorporated in 1990, the Florida Association of Nonprofit Organizations (FANO) was created to address the needs of the nonprofit community at a state level. The mission of FANO is to enhance the well being of all people and communities in the State of Florida by building the capacity of the nonprofit sector. FANO assists Florida's nonprofits in strengthening their leadership, management, financial, and public policy capacity to reach their missions. FANO is a member-based service organization (over 700 members), with services to include education, coaching, train-the-trainer programs, cost-saving offerings for liability and health insurance, workers compensation, a nonprofit database and interactive website for outreach, information and education, and a Preferred Partners Program, a strong relationship with the for profit community and private sector to increase opportunities for fundraising, board development, consultant referrals, and volunteerism for nonprofits. FANO conducts advocacy education and a minimal amount of grassroots communications activities.

Maryland Organizations

Maryland Association of Nonprofit Organizations

The Maryland Association of Nonprofit Organizations is a statewide organization comprised of almost 1,600 member nonprofit agencies, associations and institutions, and its purpose is to support and enhance the effectiveness of the State's more than 22,000 nonprofit groups in carrying out their missions of public and community service. It does this through training and technical assistance to boards and staff, offering cooperative buying programs, performing research

and fostering information sharing and networking, and public education and policy advocacy.

Massachusetts Organizations

Massachusetts Council of Human Service Providers

The Massachusetts Council of Human Service Providers is the state's largest membership organization for the human service sector. Its sector reaches one in ten residents through community-based, nonprofit, organizations. It regularly organizes its members and their employees (over 60,000) to work with their elected officials to request adequate funding for human services which includes adequate salaries for low paid workers and adequate rates to fund quality services. It also encourages its members to have all stakeholders in their programs to register and vote.

Michigan Organizations

Michigan League for Human Services

The Michigan League for Human Services (MLHS) is a statewide citizens non-profit organization dedicated to education, research and advocacy for the benefit of low income and other vulnerable citizens in the state of Michigan. MLHS is comprised of over 1,900 organizational and individual members and has served the human services community in Michigan since 1912. MLHS offers Michigan's citizens an opportunity to be connected to the state's vital human services network and the chance to affect the outcome of public policy decisions that ultimately impact the lives of all of the residents of Michigan.

Michigan Nonprofit Association

The Michigan Nonprofit Association (MNA) is the collective voice of Michigan's nonprofit organizations. MNA serves as a statewide network for the sector, a resource center on effective management practices, and as an advocate for the nonprofit community.

Montana Organizations

Montana Conservation Voters Education Fund

Montana Conservation Voters Education Fund is a statewide, non-profit organization dedicated to community organizing, public education and civic engagement on behalf of this state's clean air and water, wildlife, forests and open space. MCVEF provides tools and strategies to the conservation and environmental community to be more effective participants in this state's democratic process and coordinates voter education services to over 35,000 Montana conservationists, publishes environmental briefing papers, and monitors legislation and regulations dealing with voter registration, vote by mail, Montana's ballot measure process, and environmental issues. MCVEF also provides leadership development training on communications and civic engagement techniques to the conservation and environmental community.

New Jersey Organizations

Center for Non-Profit Corporations, Inc.

The Center for Non-Profit Corporations, New Jersey's state association of non-profits, is a 501(c)(3) umbrella organization serving New Jersey's non-profit community (including 600 members) through advocacy, public education, legal and management assistance, research and

membership programs. Its advocacy and public policy work includes direct and grassroots lobbying on state and federal issues of concern to the non-profit sector. Its grassroots lobbying activities primarily take the form of newsletters, e-mail communications and occasional web page alerts which are either distributed or visible to non-members as well as members.

New York Organizations

Bronx AIDS Services, Inc.

Bronx AIDS Services is the largest non-hospital based provider of services to Bronx residents living with HIV/AIDS or at risk for HIV/AIDS. Services for HIV positive people include pantry and nutrition counseling, case management, legal services, support groups and prevention services. Prevention services include a mentoring program for adolescent girls, prevention case management, prevention programs that use the Internet as an outreach tool, street outreach, HIV counseling and testing, programs focused on high risk populations, such as adult and young MSM of color, and general education classes held both on-site and at requesting organizations.

Nonprofit Coordinating Committee of New York

The Nonprofit Coordinating Committee of New York (NPCC) is an "umbrella" nonprofit serving more than 1350 New York City area member nonprofit organizations. Its mission involves helping New York City area nonprofits to function better. NPCC provides many workshops on infrastructure issues (such as preparing for an audit or dealing with employee issues), offers discounts on goods and services needed by nonprofits, has an active Government Relations Committee that works on legislation and regulations affecting the nonprofit sector, and provides a high

volume of telephone and e-mail one-on-one advice and referrals on numerous questions that nonprofits have.

North Carolina Organizations

North Carolina Center for Nonprofits

The N.C. Center for Nonprofits is a private, 501(c)(3) nonprofit organization that serves as a statewide network for nonprofit boards and staffs, an information center on effective organizational practices, and an advocate for the nonprofit sector as a whole. It offers services directly to all sizes and types of 501(c)(3) nonprofits, and it works closely with other local, state and national groups that assist nonprofits. It communicates regularly with its membership of more than 1,600 organizations on a wide variety of important issues.

Ohio Organizations

The Urban League of Greater Cleveland

The Urban League of Greater Cleveland is a non-profit organization working to create an equal quality of life for African Americans, other minorities and persons of indigenous status through programs, services, research and advocacy.

Pennsylvania Organizations

Pennsylvania Association of Nonprofit Organizations

The Pennsylvania Association of Nonprofit Organizations is a statewide membership organization serving and advancing the charitable nonprofit sector through leadership, advocacy, education and services in order to improve the quality of life in Pennsylvania.

Housing Alliance of Pennsylvania

Established in 1985, The Housing Alliance of Pennsylvania is a statewide membership organization working for a home within reach of every Pennsylvanian, especially those with low incomes. It conducts research, education and outreach to fulfill its mission.

South Carolina Organizations

New Morning

New Morning supports programs to reduce the incidence of adolescent pregnancies in South Carolina, primarily in Richland and Charleston counties. It also supports related research-based initiatives, and encourages the formation of community coalitions to help at-risk youth, in the interest of permanent and positive community change. It does this primarily through its e-advocacy network, www.tellthemsc.org.

Texas Organizations

Liberty Legal Institute

Liberty Legal Institute is a 501(c)(3) organization that was founded in 1997. The Institute fights to protect religious freedoms and First Amendment rights for individuals, groups, and churches. The Institute's assistance is provided free of charge to ensure all individuals and groups can thrive without the fear of governments restricting their freedoms. Liberty Legal Institute is interested in this case because it occasionally engages in grassroots efforts to effect positive change in the law for Texas families, including gains in religious freedom and other civil rights for a broad spectrum of diverse organizations and individuals.

Vermont Organizations

Vermont Alliance of Nonprofit Organizations

The Vermont Alliance of Nonprofit Organizations (VANPO) is a 501(c)(3) nonprofit organization based in Vermont. It represents over 380 Vermont nonprofit organizations, plus it has approximately 80 individual and corporate supporting members. It engages in occasional grassroots communications with its members regarding issues of interest to its members.

Utah Organizations

Utah Nonprofits Association

The Utah Nonprofits Association's mission is to strengthen and promote the success of Utah's nonprofit community. It provides training, services, and advocacy on behalf of the nonprofit sector in Utah. UNA exists to help nonprofit organizations succeed by providing their leaders with valuable information, resources and training opportunities to help them more effectively manage their organizations.

Wisconsin Organizations

NARAL Pro-Choice Wisconsin Foundation

NARAL Pro-Choice Wisconsin Foundation, a section 501(c)(3) organization, supports and protects, as a fundamental right and value, a woman's freedom to make personal decisions regarding the full range of reproductive choices through education, training, organizing, legal action, and public policy.